

NTSB Order No. EA-4375

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of June, 1995

Respondent .

Docket SE-13737

The Administrator has appealed, on the issue of sanction only, from the oral initial decision of Administrative Law Judge William A. Pope, II, rendered at the conclusion of an evidentiary hearing on January 25, 1995.¹ By that decision, the law judge

The Administrator has filed a brief on appeal, to which respondent replied. In his reply brief, respondent argues that deficiencies in the FAA's prosecution of the case bar the

affirmed an emergency revocation order of the Administrator, as amended, charging respondent with operating an aircraft on numerous occasions without a valid airman certificate, in violation of section 61.3(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 61).² Nevertheless, the law judge reduced the sanction from revocation to a one-year suspension. As discussed infra, we remand the case to the law judge for further explanation.

By way of background, the following facts are pertinent. In August 1993, the Administrator suspended respondent's airman certificates for 30 days, alleging a violation of FAR section 99.11(a). Respondent, pro se, appealed the suspension and, following an evidentiary hearing on April 12, 1994, the law judge affirmed the suspension. After rendering his decision, the law

(..continued)

imposition of any sanction, and that FAR section 61.3(a) is vague and ambiguous. Respondent's arguments on the merits of the charge sustained by the law judge are not properly before us, and we will not consider them, as he filed neither a notice of appeal within 10 days after the law judge rendered the oral initial decision, nor an appeal brief, as required by 49 C.F.R. §§ 821.47(a) and 821.48(a).

²Respondent waived the emergency procedures for expedited review. The order (complaint) also alleged a violation of section 61.60, but the Administrator withdrew that charge at the commencement of the hearing.

Section 61.3(a) states, in pertinent part:

§ 61.3 Requirement for certificates, rating, and authorizations.

(a) Pilot certificate. No person may act as pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of United States registry unless he has in his personal possession a current pilot certificate issued to him under this part....

judge advised respondent that:

the thirty-day suspension of Respondent's airman certificates shall take effect eleven days from the date of this oral initial decision, unless stayed by the filing of a timely appeal.

(Administrator's Exhibit 1, Oral Initial Decision and Order at 95, April 12, 1994.) Respondent did not appeal the decision and his suspension, therefore, became effective on April 23, 1994. He did not submit his certificates to the Administrator and continued to fly.

By letter dated June 13, 1994, the Administrator reminded respondent that his suspension had been in effect since April 1994 and would remain in effect until 30 days after respondent surrendered his airman certificates.³ On June 30, respondent surrendered his certificates. The Administrator issued an emergency order of revocation to respondent on July 14, 1994.⁴

Respondent appealed the revocation and an evidentiary hearing took place on January 25, 1995, where respondent, now represented by counsel, argued that because he had not been

³The letter erroneously stated that respondent's certificates had been "revoked" rather than suspended (this error was corrected by letter dated June 16, 1994), and listed April 12, instead of April 23, as the first day of the suspension. Respondent argues that these errors contributed to his confusion.

We find respondent's argument unpersuasive, especially considering that he had operated an aircraft several times between April 23 and the time he received the letter, see infra, n.5, which, according to respondent, was between June 23-25. (Transcript (Tr.) at 63-64.)

⁴The Administrator alleged that respondent operated an aircraft at least on the following dates: April 17, 21, 23, 28, and 30; May 9, 12, 16, 19, 20, 23, and 25; and June 2, 8, 9, and 13, 1994.

advised of when or where to send his certificates, he assumed, after asking other pilots, that the best course of action would be to wait until the Administrator requested the submission of his certificates. He further testified to his belief that, as long as he had his license in his possession, he was authorized to operate an aircraft.

At the conclusion of the hearing, the law judge found that the suspension had begun on April 23, 1994, and continued until 30 days after respondent's surrender of his certificates. During that time, respondent violated FAR section 61.3(a) by operating an aircraft when his airman certificates were not current.⁵ The law judge determined that respondent "knew or reasonably should have known that his pilot's certificates were suspended as of April 23, 1994, and he could no longer exercise the privileges of his certificate." (Tr. at 132.) He further found, however, that the Administrator's failure to contact respondent before June 13, 1994, contributed to respondent's confusion, especially given

⁵The uncontroverted testimony of a United States Customs Service Inspector, referencing Customs Service records, established that respondent, as pilot of N560CL, a Rockwell Commander 560-H aircraft, on flights from the Bahamas, landed at Fort Lauderdale Airport on the following dates: April 23, two flights; April 30, two flights; May 9, one flight; May 12, one flight; May 16, one flight; May 19, two flights; May 20, two flights; May 23, one flight; May 25, one flight; May 26, one flight; May 27, one flight; May 29, one flight; June 2, one flight; June 8, two flights; June 9, one flight; June 13, one flight. (Tr. at 38-43; Exhibit A-6.) The law judge found that "at the very minimum, all flights prior to May 22, [1994] of which there were eleven, were during the period of the suspension." (Initial Decision at 132.) The Administrator did not appeal the judge's finding that it was not appropriate to consider the flights that occurred after May 22, 1994, and we make no ruling on that aspect of the initial decision.

that respondent had been pro se at the first hearing and was unfamiliar with American judicial or administrative system procedures. As a consequence, the law judge reduced the sanction from revocation to a one-year suspension.

On appeal, the Administrator argues that the law judge mitigated the sanction in error. He maintains that respondent had been provided with adequate information alerting him that he must surrender his certificates to the FAA when the suspension took effect,⁶ and further, that if respondent were confused, he should have asked a representative of the Administrator for guidance.

Although not raised by the Administrator on appeal, we must acknowledge that, while, by law, the Board may amend, modify, or reverse the Administrator's order, the Board is bound by the Administrator's written sanction policy guidance, as well as all validly adopted interpretations of laws and regulations.⁷ The Administrator's sanction guidance table, which represents the

⁶The original suspension order directed respondent to submit his certificates to the Administrator and specified the address to send the certificates. As respondent testified, the original suspension order instructed him to "[s]urrender your license on or before this date to this office." (Tr. at 92.)

⁷Specifically, the Board

is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.

range of sanction for a single violation of a particular regulation, lists only emergency revocation as the sanction for "operation while pilot certificate is suspended." FAA Compliance and Enforcement Bulletin, 2150.3A, Appendix 4 at 15.

As we understand the law judge's decision, he found that respondent's 30-day suspension began on April 23, 1994, and, most importantly, that respondent knew the suspension began on that date, but nevertheless continued to fly. Given his disposition of the facts -- entirely supportive of the violation charged -- we are unclear as to the reasons why the law judge believes that deference is not owed to the Administrator's choice of sanction under governing statute law.

Hence, we must remand the case to the law judge for discussion of why deference is not owed to the Administrator's choice of sanction, as well as how this case is distinguished from established precedent.⁸

⁸See Administrator v. Gough, NTSB Order No. EA-4340 at 5 (1995) ("one instance of willful operation during a period of license suspension is sufficient ... to demonstrate that the airman lacks the requisite care, judgment, and responsibility required of a certificate holder...."), citing Administrator v. Dunn, 5 NTSB 2211 (1987); Administrator v. McCartney, 4 NTSB 925, 927 (1983) and cases cited therein. See also Administrator v. Morse, NTSB Order No. EA-3659 (1992).

ACCORDINGLY, IT IS ORDERED THAT:

The case is remanded to the law judge for further explanation.⁹

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.

⁹The law judge, in his discretion, may request additional briefs from the parties on the deference issue.